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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

FILED/ACCEPTED

In the Matter of)
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Fox Networks Group, Inc.)
Petition for Waiver of Section 73.658(i))
Of the Commission's Rules)
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MB Docket No. 12-31 JAN 23 2012
Federal Communications Commission
Office of the Secretary

**PETITION FOR WAIVER OF THE NETWORK REPRESENTATION RULE
AND REQUEST FOR EXPEDITED ACTION**

OF

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To: The Chief, Media Bureau

**PETITION FOR WAIVER OF THE NETWORK REPRESENTATION RULE
AND REQUEST FOR EXPEDITED ACTION**

Fox Networks Group, Inc. ("Fox") hereby respectfully requests, on behalf of MundoFox Broadcasting LLC and its expected affiliate station partners, a permanent waiver of Section 73.658(i)¹ of the Commission's Rules in order to enable the launch and encourage the growth of MundoFox, a new Spanish-language broadcast network expected to be inaugurated later this year.² Fox, an entity with extensive experience selling television advertising, proposes to represent the new network and its affiliates in the sale of both network and spot advertising.³ In particular, Fox requests that this waiver be granted as soon as possible, but in no event later than April 1, 2012, which is necessary to ensure that MundoFox has adequate time to sign up new affiliates and prepare to sell affiliate spot advertising during the critical May "upfront" sales period. A timely grant of this request would spur competition among Spanish-language

¹ See 47 C.F.R. § 73.658(i).

² MundoFox Broadcasting LLC is a joint venture of Fox International Channels (US), Inc. (a wholly-owned subsidiary of Fox) and RCN MF Holdings Inc. (a subsidiary of RCN Televisión S.A., a leading Colombian broadcaster).

³ For the sake of clarity, Fox emphasizes that it is not requesting a waiver with respect to broadcast stations affiliated with the English-language FOX network or MyNetworkTV.

broadcast networks and stations and, more importantly, offer underserved Hispanic audiences a distinct new programming option – all of which would further the Commission’s core competition and diversity goals.

I. INTRODUCTION AND SUMMARY

A waiver of Section 73.658(i), also known as the Network Representation Rule (“the Rule”), is required in order to allow independently-owned broadcast stations to be represented in the sale of non-network spot advertising by a network organization, or an organization under common control with a network. MundoFox is under common control with Fox.⁴ Accordingly, without a waiver, affiliates of the proposed new service would not be permitted to rely upon Fox for assistance in selling spot advertising, and MundoFox would face a potentially debilitating disadvantage in attempting to start a new network in competition with existing Spanish-language broadcast networks, including two well-established competitors that dominate the industry, each of which already holds a permanent waiver of the Rule. Fox requests a waiver permitting it to represent MundoFox affiliates so that MundoFox can push forward with its plans to bring diverse new programming to the Hispanic viewing market and to enhance competition among Spanish-language networks and stations.

The Commission has the authority under Section 1.3 of its rules to issue a waiver of any rule for “good cause”⁵ when “strict compliance [would be] inconsistent with the public interest.”⁶

⁴ MundoFox Broadcasting LLC will be controlled jointly by Fox International Channels and RCN Televisión.

⁵ 47 C.F.R. § 1.3.

⁶ *AT&T Corp. v. FCC*, 448 F.3d 426, 433 (D.C. Cir. 2006) (quoting *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)). See also *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (“[A] general rule, deemed valid because its overall objectives are in the public interest, may not be in the ‘public interest’ if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest.”).

Historically, the Commission has found that fostering the development of emerging foreign-language networks serves the public interest and justifies waiver of the Rule. Indeed, every Spanish-language network that has requested a waiver of the Rule to date has received one.⁷ In order to compete on a level playing field with these existing networks, MundoFox and its affiliates also need the benefit of a waiver.

Importantly, Fox asks that the FCC move expeditiously to grant this request as soon as possible, but in no event later than April 1, 2012, so that MundoFox can initiate its new service as anticipated in September 2012, the time of the traditional launch of new Fall season programming on broadcast television. The upfront sales meetings represent a crucial opportunity for broadcast (and cable) networks to introduce their planned Fall programming to prospective advertisers and to secure advertising commitments for the subsequent broadcast season. This year, the upfront meetings are expected to take place during the week of May 14. Specifically:

- MundoFox needs for the waiver to be granted by April 1 so that it quickly can complete the process of signing up new affiliates for the network. Although MundoFox already is trying to conclude deals with prospective affiliates, some stations likely will choose to await the outcome of this petition before deciding whether to go forward with this venture. For these affiliates, who are seeking help in the sale of non-network spot advertising, grant of the waiver is likely to be a key factor in determining whether to partner with MundoFox to launch the new service. MundoFox needs time between the grant of the waiver and the start of the upfront meetings to complete negotiations and finalize agreements with these affiliates, some of whom are in vital markets.

⁷ Six existing networks have received waivers of the Rule to date. *See Amendment of § 73.658(i) of the Commission's Rules, Concerning Network Representation of TV Stations in National Spot Sales; Request of Spanish International Network (SIN) for Waiver of § 73.658(i); Request of Telemundo Group, Inc. for Waiver of § 73.658(i); Request of Latin International Network Corporation for Waiver of § 73.658(i)*, 5 FCC Rcd 7280, 7281-82 (1990) ("First Network Representation Waiver Order") (granting waivers to Univision and Telemundo); *Azteca Int'l Corp.*, 18 FCC Rcd 10662 (2003) ("Azteca Order") (granting waiver to Azteca America); *Liberman Television LLC*, 25 FCC Rcd 4725 (2010) ("Liberman Order") (granting waiver to Estrella TV); *Mambo, LLC*, Order, MB Dkt. No. 10-161, DA 11-2039 (Rel. Dec. 20, 2011) ("Mambo Order") (granting waiver to GenTV); *Spanish Broadcasting Sys., Inc.*, Order, MB Dkt. No. 10-89, DA 11-2041 (Rel. Dec. 20, 2011) ("SBS Order") (granting waiver to MegaTV) (collectively, "The Network Representation Waiver Orders").

- By the start of the upfront sessions in mid-May, MundoFox will need to have a sufficient number of committed affiliates in major markets to make a credible presentation to would-be advertisers. Absent sufficient distribution, MundoFox will not be an appealing service capable of attracting advertisers.
- If MundoFox is able to show at the upfronts that it has partners in major markets, then it will be able to spend the subsequent three months competing with other television outlets for the attention of advertisers, who typically commit to a substantial portion of their annual television spending on the basis of the network upfront pitches.
- If MundoFox is able to complete negotiations with a sufficient number of advertisers, and acquires enough pre-sales commitments, it will be able to commence operation in time for the launch of the Fall television season.

In short, without a timely grant, MundoFox affiliates would not be permitted to rely upon Fox for assistance in selling non-network advertising during the crucial time period when the bulk of television advertising is sold. Missing out on sales during the upfront window would have a severe negative impact on MundoFox's and its affiliates' planned business model, which could impede MundoFox's ability to launch the new service and delay or even eliminate this potential new consumer-friendly option. Because the Bureau consistently has granted waivers of the Rule identical to the relief sought herein, Fox respectfully submits that its request for expedited treatment is reasonable.

II. MUNDOFOX INTENDS TO INCREASE THE DIVERSITY OF SPANISH-LANGUAGE PROGRAMMING AND ENHANCE COMPETITION AMONG SPANISH-LANGUAGE NETWORKS AND STATIONS

A. MundoFox Will Offer New, Different and Competitive Foreign-Language Programming in the Spanish-Language Network Marketplace

MundoFox intends to serve the needs and interests of the Hispanic population with a broad array of distinctive programming, much of which previously has not been available to American television viewers. MundoFox will produce and acquire diverse original programming from independent third party producers in the United States while also capitalizing on its owners' worldwide access to best-in-class content. As a joint venture of Fox International Channels and

RCN Televisión, MundoFox will have access to content such as Fox Deportes' exclusive U.S. Spanish-language rights to various U.S., Latin American and European soccer tournaments, as well as a library of popular entertainment and lifestyle programming currently distributed by Fox International and RCN across Latin America. The network also will license and/or commission original programs and movies from a variety of independent third parties in this country. The three largest Spanish-language networks operating in the United States today – Univision, Telemundo and Azteca – draw most of their content from Mexican studios and networks. MundoFox, in contrast, intends to bring a broader Latin American perspective to the growing Hispanic population in the United States. Between them, Fox International Channels and RCN Televisión have decades of experience producing and creating high-quality television content that is of particular interest to Spanish-speaking audiences.

Initially, MundoFox intends to provide its affiliates up to 18 hours of network programming each day, which will include one hour of national news each weeknight. The network intends to launch service in the 20 largest Spanish-language television markets, with an independently-owned affiliate in each market. Aside from providing network programming, MundoFox plans to work with its affiliates to ensure that stations broadcast at least one daily local newscast as well as other local interest programming. Collectively, this programming will help bring a new outlet for Spanish-language news and public affairs to communities across the country.

With its distinctive base of entertainment programming and a significant portion of its schedule set aside for news and sports, MundoFox expects to attract viewers from every

demographic and to be a particularly strong draw for younger Hispanic men, who currently are especially underserved in the Spanish-language entertainment marketplace.⁸

B. Emerging Spanish-Language Networks Must Overcome Both the Market Dominance of Univision and Telemundo and the Challenges Posed By Advertisers Undervaluing the Hispanic Audience

As a new Spanish-language network, MundoFox also will bring competition to a market that continues to be dominated by Univision and Telemundo, the nation's two largest Spanish-language broadcasters. Univision reaches 97% of all Hispanic television households, while Telemundo reaches 93% and Univision-owned Telefutura reaches 85%.⁹ Other competitors, including Azteca America and Estrella TV, also have achieved meaningful market penetration,¹⁰ but Univision and Telemundo continue to dominate the sale of Spanish-language television advertising. Univision properties alone account for nearly 70% of Spanish-language television advertising sales,¹¹ and the Univision network now draws an audience comparable to that of the

⁸ See Alex Ryshawy, *A Hispanic Men's Network: HombreTV's CEO Speaks*, HISPANICBUSINESS.COM, Sept. 19, 2008, http://www.hispanicbusiness.com/2008/9/19/a_hispanic_mens_network_hombretvs_ceo.htm (citing focus group sessions with Hispanic men indicating their unhappiness with the current programming marketplace as the reason for starting an Internet site geared toward serving Hispanic men).

⁹ See *Lieberman's Estrella TV Signs Up Texas Affiliates*, HISPANIC MARKET WEEKLY, Feb. 9, 2009.

¹⁰ Azteca America now reaches 89% of Hispanic television households, while Estrella TV now reaches 75% of these households. See Emily Guskin and Amy Mitchell, *HISPANIC MEDIA: FARING BETTER THAN THE MAINSTREAM MEDIA, THE STATE OF THE NEWS MEDIA 2011* (2011), <http://stateofthemedias.org/2011/hispanic-media-fairing-better-than-the-mainstream-media> (go to subsection labeled "Other Hispanic Network TV"; also, follow the link to information on other smaller stations). Other competitors include MegaTV and GenTV.

¹¹ See Meg James, *Univision Plans Three New Cable TV Channels*, L.A. TIMES, May 19, 2011. The Spanish-language broadcast networks, including two Univision properties – Univision and Telefutura – take home the lion's share of advertising dollars associated with Spanish-language television. See Anthony Crupi, *Hispanic Media Disconnect*, ADWEEK, August 9, 2011 ("AdWeek Hispanic Media Article") (reporting Kantar Media figures stating that "[m]arketers last year spent \$4.83 billion on Spanish-language TV"); Marisa Guthrie, *How the Telenovela is Beating the Networks*, THE HOLLYWOOD REPORTER, Apr. 1, 2011 (reporting Kantar figures stating that "[l]ast year, the four major Spanish-language broadcasters ... took in \$3.7 billion in ad revenue").

big four English-language networks.¹² As of November 2010, Univision was drawing 65% of Hispanic broadcast television viewers in prime time, with Telemundo attracting another 21%.¹³

Competitors attempting to contend with the major players in the Spanish-language marketplace not only have to struggle against powerful incumbents, but also against English-language counterparts that benefit from substantial economic advantages. As recent petitioners have noted, “the advertising industry pays more for English-speaking than Spanish-speaking audiences.”¹⁴ As a result, “stations that target programming to minority [audiences] are unable to earn as much revenue per [person] as stations that air general market programming.”¹⁵ While the Commission has worked to quell overt discrimination,¹⁶ recent advertising spending trends continue to demonstrate that “many marketers are still guilty of undervaluing the Hispanic TV marketplace.”¹⁷

¹² See David Bauder, *Univision Hits a TV Ratings Milestone*, USA TODAY, Sept. 9, 2010 (“Univision was the most popular network among television viewers aged 18 to 49 years old last week, the first time a Spanish-language station has beaten English stations in this key demographic in the United States.”).

¹³ See *Telemundo on the Verge of an Ambitious Expansion*, LA PRENSA, Dec. 8, 2010, http://www.laprensasa.com/309_america-in-english/948292_telemundo-on-the-verge-of-an-ambitious-expansion.html.

¹⁴ See *Spanish Broadcasting Sys., Inc. Petition for Waiver*, MB Dkt. No. 10-89, at 8 (filed Apr. 14, 2010); *Mambo, LLC Petition for Waiver*, MB Dkt. No. 10-161, at 5 (filed Mar. 5, 2010); *Lieberman Television, LLC Petition for Waiver*, MB Dkt. No. 09-192, at 9 (filed June 29, 2009) (all citing Catherine J.K. Sandoval, *Antitrust Language Barriers: First Amendment Constraints on Defining an Antitrust Market by a Broadcast's Language, and its Implications for Audiences, Competition, and Democracy*, 60 FED. COMM. L.J. 407, 439 (2008)).

¹⁵ Kofi Asiedu Ofori, *WHEN BEING NO. 1 IS NOT ENOUGH: THE IMPACT OF ADVERTISING PRACTICES ON MINORITY-OWNED & MINORITY-FORMATTED BROADCAST STATIONS*, Synopsis (2003), http://transition.fcc.gov/Bureaus/Mass_Media/Informal/ad-study/adsynopsis.html.

¹⁶ See *Media Bureau Announces Revisions to License Renewal Procedures and Form 303-S*, 26 FCC Rcd 3809, 3810 (2011) (pegging broadcast license renewal to television stations' rejection of “no Urban/no Spanish” dictates and other discriminatory advertising agreements).

¹⁷ AdWeek Hispanic Media Article. See generally *id.* (article subtitled “Telemundo and Univision still get just a sliver of the ad market. What gives?”).

The major Spanish-language networks have grown rapidly in no small part because waivers of the Rule have allowed them to represent their affiliates in the sale of spot advertising and thus to overcome some of the obstacles associated with the sale of Spanish-language advertising. Given Fox's extensive experience in the sale of television advertising, including experience with the sale of Spanish-language advertising, Fox is uniquely positioned to play this same role for MundoFox and its affiliates.¹⁸ The success of the MundoFox network will hinge on its ability to go head-to-head against powerful competitors. In order to ensure that there is a level playing field, the Commission should grant to MundoFox and its affiliates the same relief that it has granted without controversy to every applicant for a waiver of the Rule since 1990.

III. THE FCC HISTORICALLY HAS WAIVED THE RULE TO FOSTER THE DEVELOPMENT OF EMERGING SPANISH-LANGUAGE NETWORKS

The Commission adopted the Rule in 1959 to control the influence of the then-Big Three English-language networks. The Rule provides that:

“[n]o license shall be granted to a television broadcast station which is represented for the sale of non-network time by a network organization or by an organization directly or indirectly controlled by or under common control with a network organization, if the station has any contract, arrangement or understanding, express or implied, which provides for the affiliation of the station with such network organization: *Provided, however,* That this rule shall not be applicable to stations licensed to a network organization or to a subsidiary of a network organization.”¹⁹

¹⁸ Fox currently represents numerous commonly owned multichannel video programming networks in the sale of advertising. Through its work on behalf of such channels as FX, National Geographic Channel, Speed, 19 regional sports networks, and Spanish-language Nat Geo Mundo and Fox Deportes, Fox has developed a keen understanding of the television advertising market. MundoFox and its affiliates would benefit tremendously from having a team with the expertise that Fox has developed assisting in the sale of advertising on this new network.

¹⁹ 47 C.F.R. § 73.658(i).

Through promulgating the Rule, the Commission sought to ensure that networks did not concentrate control over affiliates' advertising and programming decisions in network owners' hands and in so doing inhibit competition for advertising.²⁰ Regardless of whether these types of practices ever posed an actual threat to the marketplace, the Commission has recognized in the decades since 1959 that the underlying rationale does not apply to emerging foreign-language networks.

Univision and Telemundo were granted permanent waivers of the Rule in 1990 for two reasons: the competitive difficulties faced by nascent Spanish-language networks and the diversity and competition benefits created by the emergence of these services.²¹ The Commission first found that the flexibility granted by previous, temporary waivers had been a critical component of the growth of both networks, given the paucity of independent sales representatives with experience in selling Spanish-language advertising.²² The FCC also found that granting waivers to Univision and Telemundo, as emerging foreign-language networks, would serve several important policy goals, including "encouraging the growth and development of new networks; fostering foreign language programming; increasing programming diversity; [and] strengthening competition among stations"²³

In 2003, the Media Bureau, acting on delegated authority, granted a permanent waiver of the Rule to Azteca America.²⁴ Azteca noted that "resources [were] not otherwise available to its

²⁰ See *Network Representation of TV Stations in National Spot Sales; Request of Spanish International Network (SIN)*, 43 Fed. Reg. 45,895, 45,897 (Oct. 4, 1978).

²¹ See *First Network Representation Waiver Order*, 5 FCC Rcd at 7281-82. A third Spanish-language network, Latinet, also received a permanent waiver in the same order. See *id.*

²² See *id.* at 7281.

²³ *Id.* at 7281-82 (footnotes omitted).

²⁴ See *Azteca Order*, 18 FCC Rcd at 10662 (footnote omitted).

affiliates to market national spot advertising competitively,” and the Bureau agreed that the competitive disadvantages that had led to waivers for Univision and Telemundo still existed.²⁵ Over the last three years, the FCC has received three additional applications for waivers from Liberman Television (Estrella TV), Spanish Broadcasting System (MegaTV) and Mambo, LLC (GenTV). In the orders granting each request, the Bureau again relied on the “same reasons” for waiving the Rule cited in the earlier decisions.²⁶ Moreover, in each case the Bureau recognized “the competitive imbalance that could result in the absence of a waiver,” calling attention to the difficulty a new entrant would face if it were forced to compete in the Hispanic viewing market as the only entity without the benefit of a waiver.²⁷

In short, the FCC consistently has granted waivers of the Rule to similarly-situated emerging networks. In recognition of the public interest benefits that would stem from the launch of MundoFox and in order to enable MundoFox to participate in this competitive marketplace, the Commission should grant the waiver requested here.

IV. THERE EXISTS GOOD CAUSE TO EXPEDITIOUSLY GRANT A WAIVER OF THE RULE FOR THE BENEFIT OF MUNDOFOX AND ITS AFFILIATES

A. A Waiver Grant Would Enable MundoFox to Offer Consumers a New Programming Service While Spurring Competition Among Networks and Stations, Without Any Countervailing Public Interest Harm

For good cause, the Commission may waive any rule.²⁸ A waiver excusing compliance with a Commission rule is permissible “where particular facts would make strict compliance

²⁵ *Id.* at 10663 (footnote omitted).

²⁶ Liberman Order, 25 FCC Rcd at 4726; Mambo Order, DA 11-2039, at 3; SBS Order, DA 11-2041, at 2-3.

²⁷ Liberman Order, 25 FCC Rcd at 4726; Mambo Order, DA 11-2039, at 3; SBS Order, DA 11-2041, at 3.

²⁸ *See* 47 C.F.R. § 1.3.

inconsistent with the public interest.”²⁹ Application of the rule to MundoFox and its affiliates would neither be in the public interest nor serve the underlying purpose of the rule. For all of the reasons that follow, there is good cause for the Media Bureau to grant the permanent waiver requested herein and in so doing to further competition and diversity in the Spanish-language programming marketplace.

Increasing the competitiveness of MundoFox and its affiliates would facilitate the emergence of a new foreign-language network, which would increase programming diversity and strengthen competition in the Spanish-language network marketplace. As a nascent network, MundoFox will be competing against powerful incumbents. Fox’s ability to represent MundoFox and its affiliates in the sale of network and non-network advertising would drive the growth critical to the development and wider availability of new foreign-language programming. The ultimate beneficiaries would be Hispanic American audiences, which would get access to diverse new content. MundoFox intends to deliver original Spanish-language programming, much of it never before seen in the United States, to Hispanic television markets. By programming national news, sports and entertainment, and aiding its affiliates in the development of local news, MundoFox stands ready to increase the number and variety of Spanish-language public-interest programming options available.

Granting a waiver for the benefit of MundoFox and its affiliates also would increase competition within the Hispanic television marketplace. While the English-speaking population can select from among dozens of broadcast stations and hundreds of cable networks, Hispanic television viewers have comparatively few options. Moreover, inasmuch as the current market for Spanish-language television is dominated by Univision and Telemundo, a waiver enabling

²⁹ *AT&T Corp.*, 448 F.3d at 433 (quoting *Ne. Cellular Tel. Co.*, 897 F.2d at 1166).

the launch of MundoFox would help provide consumers with a strong alternative to the big incumbent Spanish-language networks.

MundoFox's ability to compete depends on Fox's representation of its affiliates in selling non-network advertising. Both the Commission and the Media Bureau have stated that one important driver of previous waiver grants has been the need to foster competition among networks.³⁰ In granting permanent waivers to Univision and Telemundo, the Commission noted that if it had strictly applied the Rule to those emerging networks at the time of their initial waiver requests, “development of . . . new foreign-language programming services would have been hampered, if not stifled completely.”³¹ MundoFox, as an emerging network attempting to compete among powerful established players, is in the same position in which Telemundo and Univision initially found themselves, with the added difficulty of attempting to sell advertisers on new programming in a challenging economy.³²

Meanwhile, as the Bureau repeatedly has noted, emerging Spanish-language networks face an ever-growing “competitive imbalance . . . in the absence of a waiver.”³³ Six MundoFox competitors, having been granted waivers, can all now represent their affiliates in the sale of non-network advertising.³⁴ The competitive landscape for a new Spanish-language network

³⁰ See First Network Representation Waiver Order, 5 FCC Rcd at 7281 (stating that the failure of foreign language networks is “clearly inconsistent with the public interest”). See also *Amendment of Section 73.658(g) of the Commission's Rules – The Dual Network Rule*, 16 FCC Rcd 11114, 11129 (2001) (explaining that “the failure of a network [(here, the WB or UPN)] could imperil the position of many of that network's affiliates and have a negative impact on diversity of outlets at the local level”).

³¹ First Network Representation Waiver Order, 5 FCC Rcd at 7281.

³² See Andrew McMains, *Challenging Year Ahead for Ad Industry*, ADWEEK, Dec. 14, 2011 (“Looks like 2012 will be another tough year.”); Jon Lafayette, *Zenith Sees Ad Growth of 3.5% in 2012, 2013*, BROADCASTING & CABLE, Oct. 3, 2011 (forecasting that “broadcast networks [advertising revenue will] decline 2%” over the next two years).

³³ Liberman Order, 25 FCC Rcd at 4726; Mambo Order, DA 11-2039, at 3; SBS Order, DA 11-2041, at 2-3.

³⁴ See generally The Network Representation Waiver Orders.

becomes more challenging with each successive waiver granted to an existing network. Without the benefit of a waiver, MundoFox would be unable to offer affiliates the same full representation package provided by other Spanish-language networks, and would thus face a significant disadvantage in recruiting potential station partners.

MundoFox affiliates cannot compete with affiliates of other Spanish-language networks without the ability to outsource spot-sales representation. Affiliates of Univision, Telemundo, Azteca America, Estrella TV, MegaTV and GenTV all can rely on their network partners to assist them in efficiently and effectively selling spot advertising. Without a waiver, MundoFox affiliates would struggle to compete with local rivals associated with the other networks, as they typically possess neither the experience nor the resources to sell national advertising on their own. Some of MundoFox's prospective affiliates are low-power stations with little experience with any kind of national advertising sales, while others are former affiliates of other Spanish-language networks now struggling as they try their hand at independent sales. Fox estimates that the overhead required to set up an effective national sales team exceeds \$2 million, which is greater than the annual revenue of most unaffiliated Spanish-language stations.

Affiliates also continue to have few independent options for representation when it comes to spot advertising in the Hispanic marketplace. The three major English-language representation firms – Katz, Cox Reps (TeleRep) and Petry – focus primarily or exclusively on sales of English-language advertising. Only one of the three, Katz, even maintains a division devoted to Spanish-language advertising, and that division is focused primarily on radio sales.

Moreover, the sale of foreign-language advertising presents difficulties not present in the sale of English-language advertising. As noted above, advertisers often pay less than the going

English-language network rates for equivalent time on Spanish-language networks.³⁵ Fox can help MundoFox and its affiliates ameliorate this “minority discount” problem by introducing them to Fox’s extensive roster of advertising contacts and by giving them the chance to be collectively represented, thereby increasing their bargaining power. By guaranteeing MundoFox affiliates a more competitive position in the market, a waiver would improve competition at the station level as well.

Finally, there are no public interest harms that will result from a grant of the petition for waiver. As is required by FCC regulations, regardless of the waiver, MundoFox affiliates will control their own non-network spot advertising rates and retain ultimate power over their stations. Moreover, waivers of the Rule for Spanish-language networks have been uncontroversial for more than 20 years; no waiver issued to any network since the original waiver grant to Univision and Telemundo has faced meaningful opposition.³⁶

In light of these facts, there is clearly good cause for providing MundoFox and its affiliates the benefit of a permanent waiver of the Rule. Indeed, given the grant of identical waivers to MundoFox’s many competitors, a failure to grant a waiver of the Rule for the benefit of MundoFox would be arbitrary and capricious in violation of the Administrative Procedure Act. It is axiomatic that “an agency must provide adequate explanation before it treats similarly

³⁵ See *supra* notes 14-17 and accompanying text.

³⁶ No comments were filed in opposition to the three most recent waiver requests. Liberman Order, 25 FCC Rcd at 4726; Mambo Order, DA 11-2039, at 3; SBS Order, DA 11-2041, at 2. The Azteca Order from 2003 noted that the only comment filed in opposition to that waiver request was subsequently withdrawn by its author. See Azteca Order, 18 FCC Rcd at 10662 & n.5.

situated parties differently.”³⁷ There is no basis for treating MundoFox differently than any one of the many Spanish-language networks that previously have been granted a waiver of the Rule.

B. Granting the Waiver Before the May Upfronts Is Critical to Allowing MundoFox to Timely Launch its New Service and Compete With the Largest Spanish-Language Networks

As described above, the period including and immediately following the annual advertising upfront sales meetings, which are expected to take place in mid-May 2012, constitutes a crucial time period during which the bulk of television advertising is sold. Unless a waiver of the Rule is granted by April 1, MundoFox may not be able to begin serving the Hispanic audience as anticipated in September 2012, the time of the traditional launch of new Fall season programming on broadcast television. In particular, MundoFox will need time between grant of a waiver and the start of the upfront meetings to finalize its negotiations with prospective affiliates. The outcome of this petition will be a key factor in determining whether certain affiliates agree to go forward in partnership with MundoFox, since many stations want help with spot advertising sales that Fox will be best positioned to provide.

Only if MundoFox has signed up a sufficient number of affiliates in major markets can it make a credible presentation to would-be advertisers at the upfronts. A successful presentation at the upfronts is essential in order for MundoFox to secure advertising commitments in the months that follow.³⁸ More and more networks, English-language and Spanish-language, are

³⁷ *Petroleum Commc'ns., Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (naming several cases standing for this principle, including *New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361, 366 (D.C. Cir. 1987); *Pub. Media Ctr. v. FCC*, 587 F.2d 1322, 1331 (D.C. Cir. 1978); and *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965)).

³⁸ The major English-language networks sell advertising well into June. See Jack Myers, *Is Television Ratings Erosion a Myth?*, JACKMYERSTHINKTANK, BUSINESS INSIDER (Mar. 29, 2011, 3:55 AM), <http://www.businessinsider.com/television-network-upfront-20112012-them-that-has-gets-jack-myers-2011-3>. The major Spanish-language networks may not complete sales until July or August. See Tanzina Vega, *Univision Reports Robust 'Upfront' Sales*, MEDIA DECODER, N.Y. TIMES (July 25, 2011, 6:40 PM),

(cont'd)

making presentations at upfront week a key component of their advertising sales strategy.³⁹ In particular, presentations to advertisers during the upfronts have been a notable driver of advertising revenue for Univision and Telemundo and for their affiliates.⁴⁰

MundoFox needs the same opportunity to introduce its new service to advertisers if it is to have a fair chance to compete. Otherwise, both the new network and its affiliates would be forced to operate at a severe economic disadvantage in comparison to other Spanish-language networks and stations, leaving them with fewer of the resources needed to invest in creating this compelling new option. Without a timely grant, MundoFox and its affiliates would find it difficult to launch the new service, which could delay or even eliminate this potential new consumer-friendly service.

V. CONCLUSION

In sum, to foster the establishment of a new Spanish-language network and to promote competition among networks and stations, Fox respectfully requests that the Commission expeditiously grant it a permanent waiver of the Rule so that it can represent new MundoFox affiliates in the sale of non-network spot advertising.

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<http://mediadecoder.blogs.nytimes.com/2011/07/25/univision-reports-robust-upfront-sales/> (“N.Y. Times Upfront Sales Blogpost”); AdWeek Hispanic Media Article.

³⁹ See Brian Steinberg, *How Many Upfronts Does TV Need During 'Upfront Week'?*, ADVERTISING AGE, Dec. 13, 2011 (noting USA’s intention to join a 2012 upfront field “crammed full of presentations from NBC, Fox, ABC, CBS, Telemundo, Univision, CW, ESPN, TNT and [] TBS”).

⁴⁰ Univision sold 75-80% of its advertising inventory at or soon after its May upfront presentations in 2011. See N.Y. Times Upfront Sales Blogpost. Telemundo took in 55% of all new business coming in to the Hispanic market at the 2011 upfronts and, as a result, sold \$400 million of advertising inventory there. See AdWeek Hispanic Media Article. In 2011, the two between them sold \$2.15 billion in upfront advertising commitments, representing a significant percentage of all Spanish-language television advertising sales; in 2010, marketers only spent \$4.83 billion on all Spanish-language broadcast, cable, and spot advertising combined. See *id.*

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